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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MARCO ASTORGA-VASQUEZ, Defendant.	Criminal Case No. 07CR3341-IEG DATE: January 28, 2008 TIME: 2:00 p.m. GOVERNMENT'S STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR: (1) FINGERPRINT EXEMPLARS; AND (2) LEAVE TO FILE FURTHER MOTIONS

I.

STATEMENT OF THE CASE

On December 12, 2007, a federal grand jury in the Southern District of California returned a true bill of Indictment charging Marco Astorga-Vasquez ("Defendant") with one count of Deported Alien Found in the United States in violation of Title 8, United States Code, § 1326(a) and (b). Defendant was arraigned on the indictment on December 20, 2007 and entered a plea of "not guilty."

II.

STATEMENT OF THE FACTS

On December 3, 2007, at approximately 7 p.m., United States Border Patrol Agent ("BPA") Gonzalo Perez responded to a seismic intrusion device activation in an are known as "1445." The "1445" is located approximately three miles east of the Otay Mesa, California Port of Entry, and approximately one mile North of the International Border between the United States and Mexico. As Agent Perez responded to the area he observed eight people running downhill into a canyon. He pursued the individuals and, after a lengthy search, found four or them attempting to conceal themselves in high brush. Agent Perez identified himself as a Border Patrol Agent and queried each, including Defendant, as to their country of citizenship and immigration status. All four, including Defendant, answered they were Mexican citizens without documents allowing them to be in the United States legally. Defendant was thereafter placed under arrest and transported to the Chula Vista Border Patrol Station for further processing.

At the station, agents determined that Defendant had been previously deported from the United States.

The Defendant was subsequently advised of his Miranda rights, which he elected to waive. Defendant then admitted he illegally entered the United States by climbing over the International Boundary fence and walking North through the Otay Mesa mountains. Defendant also admitted he had been previously deported from the United States.

III.

MOTION FOR FINGERPRINT EXEMPLARS

As part of its burden of proof at trial, the Government must prove beyond a reasonable doubt that Defendant is the same person who was previously deported from the United States. Defendant's warrants of deportation and related documents bear fingerprints to verify his identity. In order to meet our burden of proof, the United States anticipates calling a certified fingerprint examiner to obtain fingerprint exemplars from Defendant and compare those with the fingerprints on the immigration documents.

Defendant has no privilege against providing fingerprint exemplars. The Fifth Amendment privilege is limited to communications or testimonial evidence. Schmerber v. California, 384 U.S. 757, 763-64 (1966). The Government's use of identifying physical characteristics, such as fingerprint exemplars, does not violate a defendant's Fifth Amendment rights. See, e.g., United States v. De Palma, 414 F.2d 394, 397 (9th Cir. 1969); Woods v. United States, 397 F.2d 156 (9th Cir. 1968). Compare United States v. Jackson, 886 F.2d 838, 845 n.8 (7th Cir. 1989) ("There is no doubt that requiring a defendant to give a handwriting specimen does not violate his fifth amendment privilege against self-incrimination since the privilege reaches only compulsion of a defendant's communication."). Accordingly, the Court should order that Defendant provide fingerprint exemplars to the Government's fingerprint expert.

IV.

LEAVE TO FILE FURTHER MOTIONS

Should new information or legal issues arise, the United States respectfully requests the opportunity to file such further motions as may be appropriate.

V.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that its motions for reciprocal discovery, fingerprint exemplars and leave to file further motions be granted.

DATED: January 18, 2008

Respectfully Submitted,

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